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# Dividing the Elephant: The Separation Of Mess and Joint Stock Property on The Overland Trail

By JOHN PHILLIP REID\*

## Introduction

To what degree Americans in the past respected law is a question that has attracted interest in recent times. The current emphasis upon violence as a national trait has led to a dichotomy of scholarship, with some historians arguing that American violence has been manifestly lawless,<sup>1</sup> and others contending that much of what has been depicted as mindless violence was directed and motivated not by lawlessness but by law.<sup>2</sup> A related but generally ignored question, one that surely would aid us to discover the degree to which Americans throughout their history have respected law, is how well the average citizen has understood legal rights, rules, and distinctions.

In examining the knowledge and appreciation 19th century Americans had for the law, there can be few events that promise to reveal more than the conduct of emigrants on the overland trails to Oregon and California. On that long journey of more than three months, in a vast expanse of western wilderness, people had to fend for themselves, isolated from and beyond the reach of courts, police, and the machinery of law enforcement. That they honored the property rights of one another tells us much about their respect for law. If we explore the extent to which they not only respected property rights, but also understood the distinction between various types of ownership, we may learn even more about the average American's knowledge of law.

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1. Brown, *Legal and Behavioral Perspectives on American Vigilantism*, 5 *PERSPECTIVES IN AMERICAN HISTORY* 95-144 (1971).

2. Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 *N.Y.U.L. REV.* 1043 (1974).

## Mess Property

There were two types of property rights that all Americans on the overland trail took for granted—private property and partnership property. The first was so elementary a concept as to be seldom noticed as a legal entity. The second may be summarized by considering a type of partnership peculiar to the westward movement—the mess.

The “mess” was not always a partnership arrangement. Sometimes it was contractual, or a partnership of two or more emigrants to which others were admitted by contract. Contracting members might contribute the use of property that remained private, such as a yoke of oxen, labor (*e.g.*, driving the team), or money paid before the trip or promised from anticipated gold digging in California.<sup>3</sup>

The word “mess” came automatically to the lips of overland emigrants. Five men leaving Warren, Ohio, for California, “make what they call a mess,” a local newspaper reported.<sup>4</sup> The term was often synonymous with partnership.<sup>5</sup> A traveling company, formed in Salt Lake City, dissolved after crossing Nevada’s Forty-Mile Desert and reaching the Truckee River not far from Reno, Nevada. One member

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3. An example of another type of payment plan is mentioned in the text accompanying note 10 *infra*. One forty-niner who took the trouble to record the provisions of such an agreement put emphasis upon the matter of ownership: “John Harrington’s funds which he expected at Independence not reaching him, we supposed he would be obliged to turn back. Today however we concluded to carry him through for 110 dollars which he could muster & he not to own any thing but go merely as a passenger, of course helping when needed & standing watch in his turn.” E. Perkins, *Sketches of a Trip from Marietta Ohio to the Valley of the Sacramento in Spring & Summer of 1849*, entry for May 25, 1849 (ms., Huntington Library, San Marino, Cal.).

4. *Western Reserve Chronicle*, Apr. 25, 1849, at 2, col. 6; *see id.*, May 2, 1849, at 3, col. 2.

5. However, as we will see, the emigrants had no difficulty distinguishing between a mess that was a partnership and a mess that was not. Three men from Wisconsin were partners in a wagon. After crossing the Missouri at St. Joseph, the three partners “joined in a mess with four others . . . . We were a jolly set, Hail fellows well met.” J. Wood, *Diaries of Crossing the Plains in 1849 and Life in the Diggings from 1849 to 1853*, entry May 6, 1849 (ms., Huntington Library, San Marino, Cal.). The seven remained together until reaching California, but always as two separate partnerships joined in one mess. When the second set of partners divided their property, the three partners from Wisconsin were not involved. “[T]he Boys in the other team are talking about dividing their things & I suppose they will. They are finally divided.” *Id.*, entry for July 29, 1849. Later when one of the original three wished to go to Sacramento while the other six went to the diggings at Deer Creek, Yuba River, the partners from Wisconsin alone divided, the lone man taking the wagon and “best pair of cattle” while his two partners put their provisions in the wagon of the second partnership, traveling as guests rather than owners. *Id.*, entry for Sept. 6, 1849.

called their business arrangement a "partnership."<sup>6</sup> Another said it was a "mess."<sup>7</sup>

In truth, "mess" was a vague word that obtains legal definition only in these individual cases for which we have sufficient information to understand the contractual, property, or partnership arrangements involved. Sometimes, for example, "mess" was used to indicate a small party that ate together. That was an "eating mess." On other occasions it meant a group that traveled with one or more wagons—a "traveling mess." Usually the implication was clear: the provisions or wagons were concurrently owned. Yet there was a certain amount of ambiguity connected with the word "mess," rendering it too inexact for lawyers to use with confidence. An emigrant could speak of an "eating mess" or a "traveling mess," and yet say "partnership" when referring to the ownership of concurrent property. Writing home to Rome, New York, a forty-niner reported that he and six companions had formed an "eating mess" and had "two wagons in our mess, and four yoke of cattle to each wagon."<sup>8</sup> He did not, however, speak of mess ownership when reporting what they possessed concurrently. "Our provisions, our common stock," he wrote in the same letter, "are held in partnership among us."<sup>9</sup>

It is possible the New Yorker may have been using words loosely. More likely he was not. He had reasons to distinguish between "mess" and "partnership." A lawyer in his situation would have done so. There had been seven men in the mess, only six of whom owned a share of the concurrent property. The seventh man was their guide. For "his board with us," he had been hired "to pilot" the other six "across to California."<sup>10</sup> The mess and the partnership, therefore, could in some cases have a different membership with different legal rights.

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6. "Determined to pack and leave the carriage, Capt. Littleton was not willing to leave it, so we dissolved the partnership divided stock, settled books and so on." *Letters and Journal of Henry Atkinson Stine on his Overland Trip to California from St. Louis to Sacramento*, May 4, 1850—Oct. 25, 1850, entry for Sept. 23, 1850 (typescript, Cal. State Library, Sacramento).

7. "3 of our mess concluded to leave us and pack here we divided mules provisions etc." M. Littleton, *Journal of a Trip Across the Plains from Independence, Missouri to California*, May 11, 1850—Oct. 11, 1850, entry for Sept. 23, 1850 (typescript, Cal. State Library, Sacramento).

8. Letters of J.M. Muscott to Ebenezer Robbins, letter of April 27, 1849, *Rome Sentinel* (N.Y.), May 30, 1849 (typescript, Cal. Historical Soc'y, San Francisco)

9. *Id.*

10. *Id.* Hiring for board was a common arrangement: "[H]ired William Baratt and agreed to bear his Expenses to California and he agreed to work one year and give one half of his Earnings to David Cosad." *Journal of a Trip to California by the Overland Route and Life in the Gold Diggings During 1849-1850*, entry for March 13, 1849

Emigrants did not have to be lawyers to understand that the boarder guiding the New York group had a contractual claim on the mess, but owned no interest in the concurrent property. A company from North Carolina got only as far as Knoxville, Tennessee, when it dissolved. John E. Brown, a member, sold his share and continued on alone. Aboard a steamboat he and three Tennesseans formed what he called a new "mess."<sup>11</sup> Arriving at St. Louis, they met two more emigrants and re-formed the "mess" with them "on equal shares."<sup>12</sup> Finally, after getting to Independence, the six men took inventory and discovered that only four had money. As a result, one left the group. The other, H.M. Atkinson, was apparently popular or valued as an enjoyable companion on the overland trail. The four with funds "agreed to furnish Atkinson with an outfit."<sup>13</sup> He was a member of the mess but had no property claims on it. When they reached Fort Laramie, Atkinson decided to go home. "We regretted seeing him return on foot," Brown wrote, "but he did not own any interest in the Company, and we could not spare him a mule."<sup>14</sup>

When the departing member of a mess was a partner with a share in the concurrent property, it was more difficult to effect a separation. He could not be dismissed with a handshake as could a nonowner like Atkinson. Unless the mess agreement provided that anyone leaving the mess forfeited property rights, the departing man had to be compensated. Just beyond the Missouri, in 1849, an emigrant became quite sick. The date was May 28, very late to be starting across the plains if the Sierras were to be reached before snow blocked the passes. The sick man's companions became alarmed that they might be delayed beyond the margin of safety. "We all joined in urging his return home," one of

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(ms., Cal. Historical Soc'y, San Francisco). A Wisconsin man heard of a neighbor planning to go to California in 1859. "I went to him and asked what he would board me for, and I would walk across the plains. He said \$50.00 so I handed him the gold." Brooks, *Grand Trip Across the Plains* 20 (typescript, Cal. Historical Soc'y, San Francisco). The contract might be made on the trail: "[W]e have a young man traveling with us this week he paid us 4 dollars this morning for his board." Samuel Chadwick's *Travels in California in 1852*, entry for Aug. 19, 1852 (ms., Wis. Historical Soc'y, Madison). Also, the payment for board might be labor rather than money. See J. BROWN, *A JOURNAL OF A TRIP ACROSS THE PLAINS OF THE U.S. FROM MISSOURI TO CALIFORNIA, IN THE YEAR 1856*, at 93 (1860); H. EATON, *THE OVERLAND TRAIL TO CALIFORNIA IN 1852*, at 197 (1974); W. GHENT, *THE ROAD TO OREGON: A CHRONICLE OF THE GREAT EMIGRANT TRAIL* 115 (1929).

11. J. BROWN, *MEMOIRS OF A FORTY-NINER* 3-4 (1907) [hereinafter cited as BROWN, *MEMOIRS*].

12. *Id.* at 5.

13. *Id.* at 6.

14. *Id.* at 13-14. The date was June 30, 1849.

them wrote. The man agreed and the "mess bought out his share which reduces our pockets again."<sup>15</sup>

Messes seldom divided due to sickness. It was more usual to quarrel over food, work, or the pace of travel. Only a few days out from St. Joseph, a mess from what is now West Virginia discovered that one of its members was a social misfit, unwilling to take his turn at the chores.<sup>16</sup> By meeting his price, the problem was solved:

[W]e concluded the best thing we could do was to buy him out and let him go which accordingly we did by paying him one hundred doll[ar]s he shoulder[ed] his gun carpet bag and blanket and took the track to the prairie without saying good buy to one of us.<sup>17</sup>

Generally, mess property was food, and by its very nature contained the seeds of conflict when shortages occurred. Hunger or fear of hunger bred suspicion that a messmate was eating more than his share of the common "grub." During 1856, a German and an American who had been traveling together for only a short time were robbed by Indians. Virtual strangers in the middle of a hostile desert, without horses, and with scanty provisions, whatever mutual trust previously existed between them soon dissipated. One became convinced the other was eating too much, a situation that surely would have precipitated violence, even homicide, in a work of fiction about the overland trail. Real life was different. Each man respected the other's right to property and, despite different national backgrounds, they shared an understanding of concurrent ownership. As a result, these emigrants did not resort to force; they reached a settlement. The two "parted company," the American wrote,

and divided our little share of "grub;" my share was six pints of flour, and one of coffee; no meat!! I am very glad of the separa-

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15. W. Brisbane, *Journal of a Trip Or Notes of One From Fort Leavenworth to San Francisco, Via Santa Fe in 1849*, entry for May 28, 1849 (ms., Princeton Univ.). The word "pocket" in the singular, implies the mess had common funds as well as common property. At least one mess of five members, belonging to a joint stock company, had a "treasurer." *OVERLAND TO CALIFORNIA ON THE SOUTHWESTERN TRAIL 1849: DIARY OF ROBERT ECCLESTON 70* (G. Hammond & E. Howes eds. 1950).

16. "[O]n awakening this morning we found one of our company by the name of J Woods had left the tent and was cooking his Solitary breakfast without troubling himself about the rest of us although it is his week to cook he is of a stubborn quarrelsome disposition and has tried on several occasions to raise a muss with some of the others but by using a greater degree of forbearance than would have been done under other circumstances we have got along so far without any actual hostilities but how much longer it would have lasted I am unable to say as the patience of the boys was almost exhausted." J. Wilson, *A Trip Across the Plains 7-8* (ms., Beinecke Library, Yale Univ.).

17. *Id.* at 8.

tion, for he had been stealing the little bread left after satisfying *lightly* our *crawling* appetites.<sup>18</sup>

The emigrants showed their keen appreciation of the meaning of mess property on the overland trail by acknowledging its potential for internal conflict. One mess, for example, discovered that its sugar was being consumed faster than planned. Rather than impose rationing or end the partnership, the mess divided the common stock of sugar. Each man received the same portion, and it was for him to decide how quickly his share would be consumed or how carefully it would be husbanded.<sup>19</sup> By converting concurrent into private property, the mess avoided one of the risks inherent in mess property—quarrels about unequal consumption.

### Joint Stock Company Property

When a mess was not traveling alone but was part of a company, it was easier to adjust differences between messmates who feared that too much was being eaten or that they were not receiving their fair share of the common provisions. If their company was a joint stock company, each member contributed an equal amount of capital, and property acquired by the company was concurrently held.<sup>20</sup> For these companies, disagreements could be solved by moving the unhappy man from one mess within the organization to another.<sup>21</sup>

It was also relatively easy to disband joint stock companies while on the trail. The common property was generally divided between messes already in existence, which meant that men became owners in partnership of those wagons, draft animals, and provisions they had been using.

A joint stock enterprise of sixty men from Ohio, was waiting to cross the Kansas River during 1849 when its members,

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18. J. BROWN, A JOURNAL OF A TRIP ACROSS THE PLAINS OF THE U.S. FROM MISSOURI TO CALIFORNIA IN THE YEAR 1856, at 93 (1860).

19. W. Parker, Notes by the Way, entry for May 19, 1850 (ms., Huntington Library, San Marino, Cal.). Interestingly, Parker was not a partner but a passenger who had paid \$130 to be taken overland, yet he received a share equal to the original investors. This practice also was common on the trail.

20. Although the vast majority of emigrants spoke of "joint stock companies," the articles of association sometimes referred to such an arrangement as a "joint co-partnership" or a "co-partnership." *E.g.*, Constitution of the Charleston [West] Virginia Mining Company, arts. I-II, *printed in* TRAIL TO CALIFORNIA 213 (D. Potter ed. 1945).

21. "This morning in getting up the stock Giles & Morton fell out because the grub was nearly gone and G always thought M took more than his share. To get rid of [Morton] Giles proposed to give Morton the last five dollars he had to leave his mess & join another. He accepted and barefooted Bill fell in with us for the balance of the journey." H. EATON, THE OVERLAND TRAIL TO CALIFORNIA IN 1852, at 213-14 (1974).

having become impressed with the conviction that small trains could travel much faster than large ones, and other circumstances being favorable to a dissolution, a meeting of the company was called, and a resolution adopted to dissolve into companies of ten, making an equitable division of the general stock on hands.<sup>22</sup>

Most likely, groups of tens were used for convenience. The number was about twice the size of the average mess on the overland trail, and soon proved to be too large. Beyond the Sweetwater, in what is today Wyoming, one of these new "companies" decided on a redistribution of the property:

To effect this object, we divided our stock into three shares of messes, or rather into individual shares, and afterwards formed three messes. Rudy and Ream formed one mess, McConnel and myself another, and our remaining companions the third mess in question.<sup>23</sup>

From the perspective of property law the methods for dividing company property are revealing. When the original joint stock company of sixty men dissolved, there was no mention of individual ownership. The property was parcelled by assigning it to traveling units already in existence. However, in executing the second division, the smaller group found it possible—perhaps even necessary—to utilize the concept of personal property. In order to accomplish their purpose, the men first transmuted the common stock from "company" or partnership property into private property. Then, by negotiating contracts, goods they briefly had held as individuals, were converted back into partnership or mess property. Moreover, property may have been the determinative factor influencing the path of division, for the split into three messes seems to have been an accommodation to practicalities. It is likely the company being dissolved had three wagons.<sup>24</sup>

While the existence of messes made division of property both practical and convenient,<sup>25</sup> there were special legal considerations connected with joint stock companies which complicated the property rights of the individual. Often the articles of agreement provided that no one could withdraw from the association without approval of a certain

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22. JOURNAL OF SAMUEL RUTHERFORD DUNDASS 13 (1857).

23. *Id.* at 33.

24. The original joint stock company of sixty men had owned twenty-six wagons. *Id.* at 8. It is therefore possible that this unit of ten had taken three wagons and divided into wagon messes.

25. It was practical especially when a mess was centered on one wagon, for the unit of travel was already in existence. Also, a mess was a social organization and even when packing companies, which did not have wagons, divided, messmates tended to accept their share of the property as a unit.



percentage of the membership.<sup>26</sup> The usual penalty for doing so was forfeiture of property rights.<sup>27</sup> When the Wolverine Rangers arrived on the Humboldt River, Oliver Goldsmith and one of his messmates came to the conclusion they could no longer tolerate either the slow pace of travel or the mosquitoes. When they announced they were leaving, however, the Rangers sought to dissuade them by voting

to give us each five pounds of hard bread for our interests. We thought that rather a small amount of food to carry a man through a journey of three hundred miles—which we supposed was the distance to the summit of the Sierras, though it proved to be nearer seven hundred miles by the route we took—still we determined to go and accepted the offer. When they saw we were fully decided, the different messes contributed five pounds of coffee and three pounds of sugar for us.<sup>28</sup>

Enforcement of the forfeiture rule sometimes took an ironic twist. The Wolverine Rangers, worried about the prospects of their friends getting through safely on their own, tried to discourage them by apportioning less than equal shares of the common property. Troublesome or quarrelsome men, however, found it easier to have rules suspended, as they had a bargaining tool in the desire of the rest of the company to be rid of them. Without obnoxious companions, the company could function with greater harmony, and the remaining members could claim that due to the special circumstances they had not set a precedent others could cite in the future.<sup>29</sup> The irony was that a man who was not disliked, yet who was refused permission to withdraw with a share of property, had to threaten to make himself a social misfit in order to have his way.

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26. "No member shall be allowed to withdraw from the Company, without the written consent of two thirds of all the members." Constitution of the Sagamore and California Mining and Trading Company, Lynn, Mass. art. 18 (1849) (Cal. Historical Soc'y).

27. See Constitution of the Sagamore and California Mining and Trading Company, Lynn, Mass. art. 1, § 2 (1849) (Cal. Historical Soc'y). See also Agreement of Monroe Michigan Association (1849), printed in O. COY, *THE GREAT TREK* 100 (1931).

28. O. GOLDSMITH, *OVERLAND IN FORTY-NINE: THE RECOLLECTIONS OF A WOLVERINE RANGER AFTER A LAPSE OF FORTY-SEVEN YEARS* 57-58 (1896).

29. "Held a meeting . . . to consider an application from 2 members of the Company, and of a mess, who produced much disturbance in the company, and were disposed to do any thing but right. This application . . . from 2 of the most obnoxious men in the company, prayed that we would grant them the 2 lead mules of their wagon, (mediocre animals) 6 days rations of bread, and a full discharge from the company. Some members were opposed to it at first, as a bad precedent, but when I told them how cheaply we should thus rid ourselves of these troublesome fellows, and that it must be a peculiar case, expressly for that, and no other occasion, it unanimously passed, with 3 cheers.—Such was the company's opinion of the men, and such their joy at the riddance." 1 *GOLD RUSH: THE JOURNALS, DRAWINGS, AND OTHER PAPERS OF J. GOLDSBOROUGH BRUFF* 195-96 (G. Read & R. Gaines eds. 1944).

The tactic did not always succeed, as Albert Thurber discovered. He was from Rhode Island and had joined a joint stock company from Boston.<sup>30</sup> Before very far out on the plains, he wanted to resign—even at the cost of losing most of his investment. Thurber wrote in his journal:

At night a meeting of the company was held when I proposed that if they would let me have one mule (cost \$34) and 100 lbs. of provisions that I would make over to the co. all my interest amounting to \$275.00. They would not do it. I told them that I loved peace and had made the proposition in order to have it [peace] but if they would not grant for me to leave I should take the liberty of freely expressing my opinion at any and all times.<sup>31</sup>

The company was not persuaded. Thurber was unable to obtain private property from the common store until traveling the length of today's Nebraska and arriving at Fort Laramie. He then was at "a place," as another emigrant described it that same year, "of general renovating amongst travellers."<sup>32</sup> That is, Fort Laramie was the stop on the trail where vast amounts of property were either disposed of,<sup>33</sup> thrown away,<sup>34</sup> or destroyed,<sup>35</sup> where wagons were sold,<sup>36</sup> abandoned,<sup>37</sup> or cut down into carts or light carriages;<sup>38</sup> and perhaps more than any place else, where organizations tended to disintegrate.<sup>39</sup> Thurber's company was one of those to dissolve at Fort Laramie. "[T]he dividing fever raged," he wrote. "[W]e divided into 4 messes and here the

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30. The Congress and California Joint Stock Mining Company, consisting of forty-four men chiefly from Boston and Roxbury. Journal of Albert King Thurber 18 (1849) (typescript, Bancroft Library, Univ. of Cal., Berkeley) [hereinafter cited as Thurber].

31. *Id.* at 21.

32. Dr. T., Journal of his Experience Crossing the Plains in 1849, entry for June 3, 1849 (ms., Bancroft Library, Univ. of Cal., Berkeley).

33. W. Call, Overland Journey 8 (ms., Bancroft Library, Univ. of Cal., Berkeley).

34. BROWN, MEMOIRS, *supra* note 11, at 13.

35. Hale, *Diary of Trip to California in 1849*, 2 Q. SOC'Y CAL. PIONEERS 61, 80 (1925); Diary of J.C. Buffum, 1847-1854, entry for June 11, 1849 (ms., Cal. State Library, Sacramento).

36. THE ROBINSON-ROSENBERGER JOURNEY TO THE GOLD FIELDS OF CALIFORNIA, 1849-1850, at 11 (F. Rosenberger ed. 1966).

37. D. Cosad, Journal of a Trip to California, entry for May 30, 1849 (ms., Cal. Historical Soc'y, San Francisco).

38. Diary of J.C. Buffum, 1847-1854, entry for June 11, 1849 (ms., Cal. State Library, Sacramento); Dr. T., Journal of his Experience Crossing the Plains in 1849, entry for June 10, 1849 (Bancroft Library, Univ. of Cal., Berkeley).

39. "[T]here was great contention among them [the emigrants], and a general break-up of the companies, and new arrangements made by them which caused considerable delay." J. HALE, CALIFORNIA AS IT IS 13 (1851).

company was virtually broke up and we divided [the] animals by lot.”<sup>40</sup>

James A. Pritchard described Fort Laramie at that time as looking “more like a place of dissolation than like a place for protection.”<sup>41</sup> Pritchard was a member of the Boone County Company, named for a county in Kentucky of which he had been sheriff. “[I]n consequence of the disagreement among several of the members of our company,” he wrote in his journal, “we were here driven to the necessity of dividing it.”<sup>42</sup> His description of the settlement is perhaps the best surviving account of the dissolution of a joint stock company on the overland trail. For that reason alone it is worth considering as a case study of average 19th century Americans settling an important dispute without resort to court or jury. Moreover, to accomplish their objective, they created a *sui generis* form of arbitration and it worked.

At the time the Boone County emigrants arrived at Fort Laramie, they numbered nine men, eight of whom owned equal shares in the common property. These eight fell into two rival factions of three opposed to five or, if the ninth man, a nonpartner, were counted, four against five. Sheriff Pritchard was the leader of the minority group. The other side elected Samuel Hardesty to be its negotiator.<sup>43</sup>

Some matters were settled immediately, probably without discussion. The ninth member was ignored. As Pritchard explained, he “was not one of the Company proper, he was attached nearly to travel across the country.”<sup>44</sup> Not being a partner, he had no property rights to be considered.

Had overland travelers been equity minded, Pritchard might have contended that as the original company had accepted the ninth man as a passenger, all were responsible for him and any division of the wagons as well as the provisions had to take him into account. However, the emigrants were not equity minded; they were property minded. In no known settlement of company affairs on the overland trail was any rule except ownership used in the division of property.<sup>45</sup>

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40. Thurber, *supra* note 30, at 22.

41. THE OVERLAND DIARY OF JAMES A. PRITCHARD FROM KENTUCKY TO CALIFORNIA IN 1849, at 81 (D. Morgan ed. 1959) [hereinafter cited as OVERLAND DIARY].

42. *Id.*

43. “Hardesty was selected by his friends to meet Pritchard who was selected by the other boys to divide out the Mules wagons supplies &c &c.” *Id.*

44. *Id.*

45. A different attitude, and consequently a different result, prevailed for the collapse of passenger wagon trains. These were proprietary organizations consisting of the animals and wagons, several hired hands, and passengers who paid an advertised fare to be taken to California. When these organizations were divided the passengers and

By the simple process of counting heads, most matters were quickly settled.<sup>46</sup> "In the division of the wagons & provisions there was no disagreement," Pritchard explained. "As there was 5 to 3 we gave them the large wagon, and 5/8 of the provisions were conceded to them."<sup>47</sup> Trouble developed over the mules. "There was 8 men & 10 mules—8 of the mules were old work mules & 2 young unbroke ones."<sup>48</sup> Thus, the animals were too few to go around and not of equal quality. Distribution by lottery, the procedure Thurber's larger company had followed, would have entailed risks for either side.

Pritchard was willing to gamble. He proposed a lottery, allowing each member of the company to draw one of the trained mules.<sup>49</sup> But Hardesty would leave nothing to chance. "There was 2 large mules that were considered to be worth a good deal more than any other 2, and he said that he would not divide unless he could get both of those."<sup>50</sup> Pritchard was agreeable if his group had choice of the next two.<sup>51</sup> Again his proposal was rejected. The other side wanted the six best mules and a cash settlement of seventy-five dollars.<sup>52</sup>

Pritchard became indignant. There were considerations of equity, he said, that should be thrown onto the scales: the company had been

the hired men generally took possession of the property. If concepts of equity prevailed here, it was probably because neither the passengers nor the hired men had property rights in the supplies. See *Diary of John Dalton, 1852* (typescript, Wis. Historical Soc'y, Madison). See also C. LOCKWOOD, *MY TRIP TO CALIFORNIA IN 1850 WRITTEN SIXTY YEARS LATER* 6-9; W. MILES, *JOURNAL OF THE SUFFERINGS AND HARDSHIPS OF CAPT. PARKER H. FRENCH'S OVERLAND EXPEDITION TO CALIFORNIA* 16-21 (1851); I. Lord, *Journal of 1849*, entry for July 12, 1849 (ms., Huntington Library, San Marino, Cal.); Cardinell, *Adventures on the Plains*, 1 CAL. HIST. SOC'Y Q. 57-60 (1922). Not all proprietors divided the property. In some passenger trains, dissatisfied customers who left did so without reimbursement. J. Verdenal, *Journal Across the Plains, 1852*, entry for July 28, 1852 (typescript, Bancroft Library, Univ. of Cal., Berkeley).

46. Property that was not "company" but "private" was "to revert back to its proper owner." *OVERLAND DIARY*, *supra* note 41, at 81.

47. *Id.*

48. *Id.*

49. "My first proposition was, to put the name of each of the 8 old mule[s] on a blank piece of paper and let the men draw and take the mule he drew and then fix the division of the 2 young one[s] afterwards. That proposition was rejected. I then proposed to give them first choice . . . and I the next till we had drawn 2 each—and then give him 2 next time, and I one—and he the next which would have given, us 3 and he 5. He would then [have] had the first [of] four, I the 2nd, he the 3rd, I the 4th, then of the next four he would have had the first choice of 2, I the 3rd choice & he the 4th choice, the young mules afterwards to be divided." *Id.* at 81-82.

50. *Id.* at 82.

51. "I then told him I would give him the 2 big mules John & Nance if he would give me choice of the next 2, and he the 5[th] I the 6[th] & he the 7[th] & 8[th]." *Id.*

52. "[W]e were left the little black mule, the wild untamable yellow mare mule & the 2 little unbroke[en] 3 year olds . . . the little wagon & 1/2 of the provision[s]." *Id.*

his creation while the dissolution was the demand of Hardesty's cohorts. Pritchard wrote:

I . . . told Hardesty that under the circumstances I considered the proposition, not only ungentlemanly but dishonorable. I had been at all the trouble of making the outfit. I had spent my time, and part [of] my own personal funds without one cents charge to the company. And not one member of the company had been to one cents expence or one hours trouble, except to put into the Treasury the amount due the company to make the outfit. And not only that—that I was doing this thing of seperating because Wilkie & Hardesty could not agree with Youell & Stephens. . . . I rema[r]ked to Hardesty, Thus you see Squire, I am driven to the exceedingly unpleasant necessity of seperating with you and Wilkie entirely for your sakes and on account of others nor for myself.<sup>53</sup>

Hardesty withdrew from the negotiations, replaced by his ally Wilkie who said that his side also had an equitable claim. The ninth man, the passenger traveling with the company, owned two mules and a horse. As private property they were not part of the division. The owner had elected to join Pritchard's mess, a fact that meant those traveling with the sheriff would obtain advantage of the animals. Wilkie wanted his faction compensated for the loss. That was why they insisted on being paid seventy-five dollars.<sup>54</sup>

Aside from the money, matters were quickly adjusted. The difficulty stalling the negotiations had apparently concerned the value of the property, not particular items. Rather than arguing about which side took what animals, Pritchard proposed that they put a price on all their property, "Mules & wagons &c &c," and then divide everything according to worth at a ratio of three to five.<sup>55</sup> Wilkie agreed and the two sides apparently had no difficulty pricing the animals. "In that way," Pritchard wrote, "we very soon effected a division of everything. If I wanted anything I paid to him the worth [of] it. If he wanted anything [that could not be divided] he paid the worth of it to me."<sup>56</sup>

The only matter still in dispute was the demand for seventy-five dollars, and on that question there could be no compromise. "I considered it unjust," Pritchard explained.<sup>57</sup> Had the company been east of the Missouri river, they might have resorted to a law suit, but at Fort

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53. *Id.* at 82-83.

54. Considering it "unjust," Pritchard does not explain the demand for money except to say that Wilkie claimed the money "because Abbott joined our mess to travel with us across the plaines and therefor his mules would be put to our wagon." *Id.* at 83.

55. *Id.*

56. *Id.*

57. *Id.*

Laramie there were no courts for hundreds of miles. To resolve the question, the antagonists agreed on the closest equivalent—an arbitration proceeding.

The question whether Pritchard's side owed the money was submitted for judgment "to 3 disinterested men one to be chose[n] by him, one by me, and they two to select the 3[rd] person."<sup>58</sup> The parties even drew up a stipulation of facts for the guidance of the referees:

About the 3rd of May 8 men with 2 waggons & 10 mules overtaken by W.W. Abbott & his 2 mules & his white horse with about 200 lbs. of baggage, and provisions & proposed to those 8 men to give them his provisions and the use of his 2 mules to work in the waggons, and the use of his poney when we wanted to chase buffalo upon only—and to carry his baggage to California and he to be as one of us in the mess. Now we want to divide the company into 2 parts, and each of us original 8 men mutually agree to a dessolution 5 men in one mess, and 3 in the other—Abbott joining with the 3 members of the former company. Now these 5 men claim money from the 3 men for the use of the 2 mules of Abbott's from this to California.<sup>59</sup>

While Wilkie, Hardesty, and their three partners may have believed they had a legal right to compensation for the loss of Abbott's mules, it is more likely they were thinking in terms of fairness and equity. They had helped carry Abbott to Fort Laramie, contributed to his share of the mess, and now the other group alone would reap benefit from his animals.

But regardless of whether the claim was legal or equitable, the referees saw no merit in Wilkie's argument. Happily for us they submitted a written opinion to the parties, a unique document on the overland trail and surely one of the earliest judicial decisions in the legal history of the state of Wyoming. The opinion stated:

[W]e can see no just cause why the mess of 3 men Should pay anything to the mess of 5 men. It being . . . a mutual and simultaneous agreement to desolve the original contract. The fact that Abbott joines in with the 3 men does not alter in our opinion the matter of the case—for the dessolution being mutually agreed upon, all the parties Stand in the Same relation to each other which they did, before any contract was entered into. And Abbott might or not just as he chose unite with either party. If he chose to unite with neither party, then clearly neither could claim of the other. If he United with a foreign party then who could think of claiming any thing of such a party.<sup>60</sup>

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58. *Id.* Because of the crowds gathered at Fort Laramie to recruit and reorganize, referees were readily available.

59. *Id.* at 84.

60. *Id.*

There is no way of knowing if any of the referees were lawyers. The fact may not matter, as it is likely the decision would have been the same regardless of available legal talent. Except for the unique wealth of details recorded by one of the parties and the resort to arbitration, there is nothing unusual about this settlement. Like all others of which we have accounts, it was resolved by legal principles. Pritchard had not wished to divide,<sup>61</sup> yet received no consideration for that fact. Nor did he get credit for having organized the company or for contributing more money than the others. Their joint stock contract apparently acknowledged only equal contributions, and the property was divided into equal eights because all the partners were equal owners. By the same standards, the referees rejected Wilkie's demand for seventy-five dollars. Only the original contract, the contract with Abbott, and the dissolution contract guided their decision. Finding nothing in the three agreements to sustain the claim, they refused to compensate the claimants for lost expectation. Legal rather than equitable rights determined their verdict.

### Concurrent Property as a Liability

Pritchard's extensive negotiations were a luxury larger companies could not afford. When numbers were great and property valuable, time was not available for individuals to squabble over any question except the definition of equal division. They had to agree on general rules or they could not dissolve. On the same day that Sheriff Pritchard's Boone County Company divided its concurrent property between two messes, the Cincinnati Mining and Trading Company was also at Fort Laramie reorganizing itself from a joint stock to a "traveling company." With a capitalization of \$25,000 and a membership of fifty men separated into ten messes of five persons each, it owned ten mule teams, one ox team,<sup>62</sup> "and a large Santa Fe wagon."<sup>63</sup>

Before reaching Fort Kearney in Nebraska the members of the Cincinnati company had discovered that their wealth was not a source of strength. It was instead a source of disharmony, dissension, and division. In his diary, a member explained why:

Our teams are beginning to be a good deal jaded, our wagons being much too heavily loaded. At noon called a meeting of the com-

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61. A month later he would no longer be traveling with any member of the Boone County Company. *Id.* at 107-08.

62. A. Nixon, *Journey to the Pacific Ocean*, entry for April 23, 1849 (ms., Cal. State Library, Sacramento) [hereinafter cited as Nixon].

63. *Id.*, entries for April 25-26, 1849. The wagons had been purchased earlier on the trail.

pany and at which meeting resolved to abandon a part of our property as it was considered impossible almost to take it through. A committee, composed of two others and myself, was appointed to select out the property to be abandoned and in accordance to said duty commenced designating the articles which should be left and among the proscribed articles was a coining ap[p]aratus which had cost the company between 5 & 600\$, but to this sacrifice of property this is of said ap[p]aratus, there was quite a good deal of dissatisfaction, consequently the committee had to consent to let it go.<sup>64</sup>

The dispute about the coining machine exemplifies a common reason for trouble within joint stock companies. Just as small messes often dissolve over suspicion that companions were eating more than their share of the partnership provisions,<sup>65</sup> joint stock companies divided over the rate of travel, the necessity of carrying certain kinds of property, and the weight of property that could be safely hauled in their wagons.<sup>66</sup> The dispute over the coining machine probably embodied all three issues.

The victory of those who wished to retain surplus property could at best be temporary. As the draft animals weakened and fears rose in proportion, the alarmists were certain to become more vocal. One day beyond Fort Kearney and eight days after being persuaded to keep the

64. *Id.*, entry for May 10, 1849.

65. See notes 18-19 & accompanying text *supra*. For a published account of men in a mess suspecting each other of helping themselves to bread, see *From Ohio to California in 1849: The Gold Rush Journal of Elijah Brown Farnham*, 46 IND. MAG. HIST. 297, 303 (1950). Joint stock companies, which usually had large surpluses during the period of their existence, faced the problem of consumption in a different sense. Thus the physician of the Cincinnati company, finding much of the company brandy gone and no one confessing to having drunk it, wrote in his diary: "Our Brandy was taken along for medicinal purposes the company being organized under the titotal abstinence principle, but that Brandy was a very popular preventive and of course was *all* used medicinally." *Id.* The Washington City Company had a somewhat similar experience. "At night the disaffected gang, or 5 of them, stole the wine, reserved for medicinal purposes. . . . They turned the bung of the keg down and swore the wine leaked out, though I noticed great laughter & hilarity in their wagons at night." 1 GOLD RUSH: THE JOURNALS, DRAWINGS, AND OTHER PAPERS OF J. GOLDSBOROUGH BRUFF 195-96 (G. Read & R. Gaines eds. 1944).

66. "[W]e k[n]ew that we must either loose a great deal of our property now by throwing it away or loose all our teams soon with provisions clothing and every thing else if we did not do something to help our horses so we all agreed to throw away every thing that we did not actu[a]lly stand in need of and there were several who wanted to throw away all the tools but this was opposed by C. C[h]urchill, the captain] & H. Buckner [the company physician] . . . so we over halled our waggons and threw away a great many things that we thought might be disposed of but was still compelle[d] to hall 2 or 300 lbs of tools and castons which never was worth having even when they wer[e] first made." Diary of P. Castleman While Crossing the Plains to California, entry for Sept. 14, 1849 (ms., Beinecke Library, Yale Univ.).



coining machine, the Cincinnati company appointed another committee whose duty should be to have a general supervision over the property of the Co[mpany] and make such sales purchase or disposition of property as they might deem proper to expedite our movement towards the end of our journey.<sup>67</sup>

One of the committee's acts was to contract with another emigrant to carry the controversial coining machine to Sacramento.<sup>68</sup> Although the company members may not have expected to see the apparatus in California,<sup>69</sup> what is important is that the different sides solved the problem by compromise. One faction saved face by not discarding the machine; the other accomplished its goal of relieving the draft animals of excessive weight. The restoration of good feelings was only temporary, however, for some members of the company continued to worry about the weight of the property being hauled while others insisted nothing more be thrown away. At Fort Laramie the inevitable was discovered: so much property was being abandoned by other overloaded emigrants that it was impossible for the company to sell its surplus<sup>70</sup> as had apparently been planned.<sup>71</sup> The men were now "much dispirited as our animals were beginning to give out. Many were in favor of dissolving the company and dividing the property equally among the messes."<sup>72</sup>

With fifty members, and surplus property worth thousands of dollars in the states but valueless on the upper reaches of the North Platte, the Cincinnati company could not thresh out a negotiated settle-

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67. Nixon, *supra* note 62, entry for May 18, 1849.

68. "Last evening we sold our ox team and wagon to a Mr. Sidle and also bargained with said S. to take our coining Ap[p]aratus through to Sutter's Fort for \$100." *Id.*, entry for May 23, 1849.

69. The man transporting it was "not bound to deliver the coining Ap[p]aratus at the Fort if he fails to get his wagons through." *Id.* Contracting on the overland trail with fellow emigrants to act as private carriers and deliver goods somewhere in Oregon or California occurred quite frequently. See, e.g., I. Harvey, To California in 1850, at 41 (ms., Bancroft Library, Univ. of Cal., Berkeley); H. Pomroy, Diary 34, entry for July 8, 1850 (photostat, Bancroft Library, Univ. of Cal., Berkeley).

70. Nixon, *supra* note 62, entry for June 3, 1849. See also THE DIARIES OF PETER DECKER 86 (H. Giffen ed. 1966); Letter from Daniel Powell, June 23, 1849, Western Reserve Chronicle (Warren, Ohio), Aug. 22, 1849, at 2, col. 2.

71. Back on the Platte, the diarist had been appointed to a second committee to "make such sales purchases or disposition of property as they might deem proper to expedite our movement towards the end of our journey." Nixon, *supra* note 62, entry for May 18, 1849.

72. *Id.*, entry for June 4, 1849. "Much consultation and talk has been going on in regard to dissolving the company. Some are much opposed to it but a large majority is much in favor of it and in a few days the Cin[cinnati] Mining and Trading Com[pany] will be numbered with the things that were." *Id.*

ment or call in arbitrators to settle personal grievances. If a dissolution was to occur, there was little alternative to the proposal of "dividing the property equally among the messes."

A meeting was held and a committee appointed to draft "a set of resolutions to be submitted to the Co[mpany]." <sup>73</sup> Unfortunately we are not told the specifics of the "ten or twelve" proposals eventually adopted. The missing details may not be significant, however, as their general import has been recorded and the record reveals enough to understand what was decided. "They provided for an equal distribution of the property only leaving the dis[s]olution of the company to the vote of another meeting." <sup>74</sup>

Two days later the men gathered for the last time as members of a joint stock enterprise. "Another meeting was called when a resolution was adopted dissolving the company. Also a set of resolutions [was] adopted for the reorganization of the company for traveling purposes." <sup>75</sup> The men then rolled out of Fort Laramie and up the Platte "in fine spirits." <sup>76</sup>

### The Alternative of Traveling Companies

Property, property rights, and the threat to safe travel that rights in property sometimes held for the emigrants determined not only how, but why the Cincinnati Mining and Trading Company dissolved. There was little animosity between the men. <sup>77</sup> They did not separate; <sup>78</sup> they merely changed their form of ownership and rate of progress by converting from a joint stock company to a "traveling company."

Traveling companies were formed for convenience, safety, and companionship. <sup>79</sup> No common property rights existed between the members. Members were often individual property owners traveling in

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73. *Id.*, entry for June 5, 1849.

74. *Id.* "The meeting then adjourned and all hands went briskly to work to make a new outfit. . . . Several thousand dollars worth of property will be abandoned at this camp." *Id.*

75. *Id.*, entry for June 7, 1849.

76. *Id.*

77. "The whole of the day [of the division] has been busily occupied and the most friendly feelings appears throughout the whole train." *Id.*, entry for June 5, 1849.

78. The company would still be together at the crossing of the North Platte, today's Casper, Wyoming. *Id.*, entry for June 13, 1849.

79. The pattern was set by the great migration of 1843. See M. MATTES, *THE GREAT PLATTE RIVER ROAD* 13-14 (1969). For the rules of that company, led by a future governor of California, see Letter from Peter H. Burnett to James G. Bennett, Jan. 18, 1844, reprinted in *THE FRONTIER EXPERIENCE: READINGS IN THE TRANS-MISSISSIPPI WEST* 97-98 (R. Hine & E. Bingham eds. 1963).

family wagons or partners in a mess. People joined a traveling company and left it at will. They were not restrained by property interests to remain with disagreeable individuals or slow-moving teams.<sup>80</sup> Within a month of the dissolution in Fort Laramie, former members of the Cincinnati company had dispersed along the trail and traveled on alone, in small groups, or with wholly new companions.<sup>81</sup>

The problem faced by the Cincinnati company was resolved by distributing concurrent property; however, it must not be overlooked that this problem would not have arisen had it not been for the concept of concurrent property and its legal implications. The members owned their wagons, their cattle, and their provisions in common stock, and that arrangement of ownership was their undoing. Men who were impatient to reach the gold fields or fearful that the oxen were overloaded, fretted at the restraints placed on them by concurrent property. That method of ownership forced every member of the company to travel at the pace of the slowest wagon. Once property was individually owned or held by a mess partnership traveling with a single wagon, the restraint was removed. Men could push ahead, stay and rest their weary mules,<sup>82</sup> or judge for themselves what provisions were indispensable and what items were expendable.

A desire for freedom and fear that overburdened animals would never reach California led to the dissolution of the Cincinnati company. By altering their method of ownership, the company members altered their rate of progress to the Pacific. By making it possible to depart at will, the company restored harmony to the group. That very harmony ironically insured the company's eventual disappearance as a legal entity.

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80. "[O]ur mess, and the mess from Rutherford County, North Carolina . . . concluded to leave the train and endeavor to travel more steadily, and if possible more expeditiously than we had been doing." BROWN, MEMOIRS, *supra* note 11, at 11.

81. For example, when Nixon reached what is now Nevada, he was traveling with four wagons from Iowa. When the Iowa company began to move faster than the Ohio wagons, one of the Ohio messes broke away and went with it. Nixon, *supra* note 62, entry for July 22, 1849. Less than three weeks after dividing at Fort Laramie, Sheriff Pritchard had lost two of the companions who sided with him, and was traveling only with Abbott, his former company's passenger. OVERLAND DIARY, *supra* note 41, entry for June 28, 1849.

82. Sometimes the discontent could be caused by fear the animals were being driven too hard: "Our Captain . . . wanted to break camp, to push on without giving our mules and horses time to recuperate; as they were thin and footsore, the majority thought it wise to remain in this valley until next day. The controversy was amicably settled by dividing our medicines and our joint property satisfactorily." E. Bourne, Diary of an Overland Journey to California in 1850, entry for June 27, 1850 (typescript, Bancroft Library, Univ. of Cal., Berkeley).

## Conclusion

We have not been considering the respect for property of 19th century Americans as exemplified by the conduct of emigrants on the overland trail. We have been considering two forms of concurrent property, how well they were understood, and how they shaped the course of events beyond the frontier, where law is often said to have ended and lawlessness to have begun. In truth, these may not be two topics, or, if they are, they should not rigorously be separated. To assert that the emigrants who traversed the continent on the overland trail respected rights of mess or joint stock property may be the same as saying that the meaning and implications of these types of property ownership were being acted upon, and, by being acted upon, were understood.

It would be possible to speak of violence, but that theme has been misleading American historians for far too long. When Oliver Goldsmith of Michigan sought a private share of the common provisions so that he might leave the slow-moving Wolverine Rangers, he did not ask for a right but for an accommodation. He gave no indication that the company could not deny him what he sought. He recognized that the property was concurrent, not private. By seeking to terminate his contract and depart prematurely, he was begging an indulgence of the majority. It was his companions, not he, who had the "right." What they allotted him, he called "an offer." It was, he said, an offer he "accepted." Goldsmith knew he had been asked to accept or reject a contract.<sup>83</sup>

Of course there were some emigrants, caught in the vise of concurrent property, who thought of using violence to escape their dilemma. Albert Thurber, the Rhode Islander who was not released from his contract by the Congress and California Joint Stock Mining Company,<sup>84</sup> found two other members who also wanted to leave. At Fort Laramie they agreed that if the majority did not divide, "we would take our armes and walk out and take all the animals we needed and the best in the company."<sup>85</sup> The significant fact is that they did not do so because they did not have to, nor did any other recorded emigrant have to resort to force in order to effect a settlement of concurrent property. As Thurber wrote, "the dividing fever raged" at Fort Laramie.<sup>86</sup> His

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83. See text accompanying note 28 *supra*.

84. See text accompanying note 31 *supra*.

85. Thurber, *supra* note 30, at 22.

86. See text accompanying note 40 *supra*.

fellow New Englanders were also chafing under the restraint of concurrent ownership.

The point is not merely that violence was avoided and property divided peacefully. The lesson is that because the average emigrants understood the legal concepts with which they were dealing and knew that their adversaries understood the same principles, they were able to dissolve unwieldy organizations and form new ones according to rules of property law rather than by force. Overland emigrants divided the elephant; they did not fight over it.<sup>87</sup> For the very reason that law was not a mystery to 19th century Americans, there was less need for violence in the American wilderness than has generally been assumed.

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87. "The phrase 'to see the elephant,' meaning, in general, to face a particularly severe ordeal, to gain experience by undergoing hardship, or to learn the realities of a situation at first hand, had been current as early as 1835, but it probably reached the maximum use at the time of the Gold Rush." *TRAIL TO CALIFORNIA* 187 n.1 (D. Potter ed. 1945). See also 2 *A DICTIONARY OF AMERICAN ENGLISH* 874 (W. Craighe & J. Kulbert eds.); J. HANNON, *THE BOSTON-NEWTON COMPANY VENTURE* 114 n.11 (1969); E. MARGO, *TAMING THE FORTY-NINER* 3 (1955); M. MATTES, *THE GREAT PLATTE RIVER ROAD* 61 (1969).